Supreme Court No. 85784-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondents

v.

PORT OF SEATTLE,

Petitioner.

AMICI CURIAE MEMORANDUM OF THE ASSOCIATION OF WASHINGTON BUSINESS, WASHINGTON RETAIL ASSOCIATION, WASHINGTON PUBLIC PORTS ASSOCIATION, CITY OF KENT, AND AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA SUPPORTING THE PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

I. INTRODUCTION

This memorandum is filed by a diverse coalition of public and private organizations who are or who represent commercial and industrial premises owners who routinely structure legal relationships with vendors and other outside entities according to licenses allowing limited commercial use of their premises. This amici coalition supports review of the Court of Appeals' published opinion reversing the trial court's order on summary judgment. *Afoa v. Port of Seattle*, 160 Wn. App. 234, 247 P.3d 482 (2011).

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. THE ASSOCIATION OF WASHINGTON BUSINESS

The Association of Washington Business ("AWB") is Washington State's Chamber of Commerce and principal representative of the state's business community. AWB is the state's oldest and largest general business membership federation, representing the interests of approximately 7,500 Washington companies who in turn employ over 650,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations who

do business across the country and around the world. As commercial and industrial premises owners and including companies who routinely grant licensees the opportunity to come onto the premises to conduct business, as well as owners who routinely contract or subcontract with others for services, a number of AWB members have an interest in distinguishing the rules that govern rights and obligations for licensees and for independent contractors.

B. THE WASHINGTON RETAIL ASSOCIATION

The Washington State Retail Association ("WRA") is the institutional representative of the state's retail industry, representing 2,800 member storefronts. It has adopted as its mission statement to represent the legislative, regulatory and political interests of the industry in Washington and to secure cooperation with and among other organizations in the furtherance of those objectives. WRA members include large commercial retail property owners who enter into license or franchise agreements with outside entities or vendors without anticipation of thereby entering into employment or general contractor relationships. From time to time the association files amicus curiae briefs in matters of importance of its membership.

C. THE WASHINGTON PUBLIC PORTS ASSOCIATION

Founded by the Legislature in 1961, the Washington Public Ports Association ("WPPA") promotes the interests of the state's citizen-created port districts in the promotion of trade and economic development and the operation of marinas, docks, airports, railroads, industrial sites, and recreational facilities across the state. WPPA focuses on governmental relations, education, and advocacy for the port community and from time to time participates as an amicus curiae in matters affecting the interests and mission of the state's ports.

D. THE CITY OF KENT

The City of Kent is the sixth largest city in the State of Washington with a population of approximately 115,000 and a geographic area of 34 square miles. Kent's economy boast's the country's fourth largest manufacturing and distribution center and is home to over 4,500 businesses and approximately 78,000 jobs contributing to a $8 billion gross business income in the city. As an extensive property owner with numerous license and franchise agreements with vendors and entities, the city is directly interested in the court's interpretation and application of tort liability for land-owning licensors.

E. AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA

Airports Council International – North America ("ACI-NA") represents the state, regional and local governmental bodies that own and operate the principal commercial airports in North America. ACI-NA's many member airports handle approximately 95 percent of the domestic and international passenger and cargo traffic in the United States. ACI-NA's advocacy on behalf of its members includes participation as amicus curiae in order to ensure that applicable law promotes safe and efficient airport operations.

III. ISSUES OF CONCERN TO AMICI CURIAE

Among the issues presented in the Petition for Review, this memorandum seeks to address two:

> A. Whether a landowner, acting as a licensor, can be liable to the employees of a licensee as if the landowner were a general contractor and the licensee and independent subcontractor; and
>
> B. Whether, under *Stute*, a landowner who is a licensor rather than general contractor, owes a nondelegable statutory duty to enforce specific safety regulations for the benefit of the licensee's employees.[1]

[1] For sake of brevity, amici do not address the third issue presented in the petition, viz., whether the licensee's employees are licensees or invitees for purposes of premises liability.

IV. REASONS TO GRANT REVIEW

WHETHER AND ON WHAT BASIS COMMON LAW AND STATUTORY GENERAL CONTRACTOR LIABILITY EXTENDS TO LICENSORS IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Under RAP 13.4(b), the Court may accept review of a decision of the Court of Appeals where "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Amici contend that whether common law and statutory tort liability ordinarily applicable to general contractors who retain control over the means and manner of work by employees of an independent contractor extends and applies to the employees of mere licensees is an issue of substantial public interest.

The Court of Appeals would send this case to a jury on the question of legal duty based on this view:

> The Port's argument that it owes no duty to Afoa because EAGLE is not an independent contractor with the Port and its contract with EAGLE is merely a "license agreement," misses the mark. Whether the agreement between the Port and EAGLE is called a "license agreement" or any other term is immaterial. Nor does it matter that the Port does not consider EAGLE to be an "independent contractor."

Afoa, 160 Wn. App. at 241.

A. The Nature of the Relationship Controls

All parties and amici would agree that the name of the relationship is not decisive, but the substance of the relationship is.[2] The central defect in the Court of Appeals decision is its failure to consider how the licensor-licensee relationship is fundamentally different than a principal-agent, employer-employee, or general contractor-independent contractor relationship. This is not merely reversible error, it extends tort liability, for the first time in Washington (and perhaps across the country) to a new category of relationships well beyond the recognizable boundaries of prior decisions of the Supreme Court and Court of Appeals.

B. Licensor-Licensee and Principal-Contractor are Intrinsically Distinct Legal Relationships

As the Port points out in its Petition, at 10-11, a license is predominately a function of real estate law. The license granted by the Port to EAGLE allowed the company to come onto the Port's property and ply its trade in service of the airline companies who also do business at the Port, and who themselves hire and do business with EAGLE. The Port further suggests, Petition at 7, that other entities besides EAGLE hold the same license and perform similar ground support work for airlines on the

[2] Thus, Respondent's exegesis of the Restatement (Third) of Agency sections 1.01 and 1.02, Answer at 13, is beside the point, since the Restatement authors are merely confirming that it doesn't matter what a relationship is called but rather what it is.

property. The Port has no role in selecting or preferring vendors; it merely licenses those vendors who obtain the requisite certificate from an airline. As a landowner, the Port stands essentially in the same position as the Space Needle in *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002).

The Court of Appeals found significance in the various limitations contained in EAGLE's license, finding them tantamount to retained control over its employees work: "... genuine issues of material fact exist regarding whether the Port so involved itself in the performance of EAGLE's work as to undertake responsibility for the safety of EAGLE's employees." *Afoa*, 160 Wn. App. at 244.

But there is a critical distinction between a licensor restricting a licensee's permitted use of property and a principal retaining control over the means and manner in which a contractor performs the contracted work. If this were the latter kind of case, one would expect to find in the agreement between the Port and Eagle typical indicia of an independent contract. Yet there is no express or implied description of a scope of work EAGLE would be performing for the Port set forth in the license. There is no provision for the payment of money for services to EAGLE in the license for any such work. There is no retained control over the means

and manner of performing work because there is no work being performed for the Port under the license agreement. The Port is expressly not in the same position as the general contractor in *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978) and its progeny, or *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990) and its progeny.

Thus far from being "immaterial" as the Court of Appeals misunderstood it, 160 Wn. App. at 241, and far from being "magical words formalism" as Respondent attempts to ridicule it, Answer at 8, licensors have a fundamentally different relationship to licensees than general contractors do with independent contractors. By its very nature the licensor does not retain control over the means and manner of work because performance of work for the licensor is not the essence of the agreement – the mere use of the licensor's land is. The Court of Appeals has made a category mistake, and the Supreme Court should take review to re-affirm the legal distinction between licensors and general contractors.

C. License Agreements Should Not Be Construed to Subject Licensors to Employer Liability As Such

Amici members include large retail shopping centers and outlets, commercial and industrial properties, and large public owners of land and facilities, where a variety of business uses may be licensed to be present. It is not unusual for the corporate landowner to enter into a license – as

opposed to a contract for services – with another business entity allowing access to the landowner's property for a commercial purpose subject to whatever restrictions the parties agree to. It is a tremendous upheaval of commercial expectation to now discover that restrictions in the license or franchise may now be construed as controls over the means and manner of a vendor's work sufficient to attach *Kelley/Stute* liability.

For example, for amicus City of Kent, a common occurrence is for a contractor on a third party construction project to pay for and obtain a license (permit) in order to perform work on or under the streets and curbs of the city. *See* Kent City Code § 6.06.020. The permit requirements require these licensees to follow rules and traffic laws, adhere to various regulatory construction standards, and provide traffic control, *id* at § 6.06.060, and may be suspended or revoked for violations. *Id.* at § 6.06.040. The city does not retain the right to control the means and manner of how the employees of contractors or subcontractors perform their construction work. Yet under the Court of Appeals' expansive reading of licensor's liability, however, it is now an open question whether the city would face common law and statutory liability to the injured employee of a permittee despite no intention to take on an employer-employee or principal-contractor relationship.

For the owners and operators of commercial airports that make up the membership of amicus ACI-NA, the Court of Appeals' decision would undermine the essential system that commercial airports use to balance the federal obligation to allow open access to the airport for aeronautical activities against the need to assure safety and security on airport property. Licensees on an airport typically provide services to the public or to other aviation service providers, but not to the airport owner itself. Airport owners depend on license agreements to assure that licensees comply with safety and security standards while permitting the licensees to carry out their independent business operations. Making airport owners vicariously liable for ordinary torts involving employees of airport licensees would impose liability on airport owners for discharging their obligations to protect the public safety.

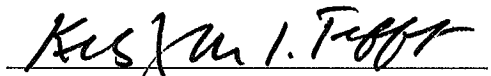
Clearly, the distinction between a licensor and a general contractor is a real one, and by blurring the difference and expanding the liability of licensors, the Court of Appeals has gone beyond mere reversible error to creating an issue worthy of Supreme Court review.

V. CONCLUSION

Based on the foregoing, amici urge the court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted this 31st day of May, 2011.

ASSOCIATION OF WASHINGTON BUSINESS



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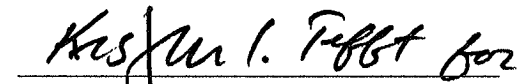

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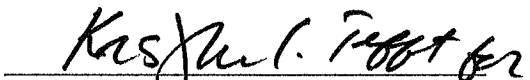
CITY OF KENT



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